

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL
COALITION, et al,**

Plaintiffs,

v.

Civil Action No. 3:08-cv-00088

HOBET MINING, LLC

Defendant.

**HOBET MINING, LLC'S MOTION TO
STRIKE THE AFFIDAVIT OF DENNIS LEMLY**

Defendant Hobet Mining, LLC (“Hobet”), by counsel, hereby moves this Court for an order striking the testimony of Dr. A. Dennis Lemly contained in certain affidavits. Specifically, Hobet moves to strike the affidavit consisting of the declaration filed by Dr. Lemly in this case at Doc. 41-2. Plaintiffs have withdrawn Dr. Lemly as a testifying expert witness at trial in *OVEC, et al. v. Apogee Coal Company, LLC*, Case No. 3:07-cv-00413, and thus any prior testimony proffered by him constitutes inadmissible hearsay. *See, e.g., Glendale Fed. Bank, FSB v. United States*, 90-772 C, 39 Fed. Cl. 422, 425 (Fed. Cl. 1997) (“Where an expert witness is withdrawn prior to trial . . . the prior [] testimony of that witness may not be used. That [] testimony is hearsay.”); *Minebea Co., Ltd. v. Papst*, CIV.A. 97-0590 (PLF), 2005 WL 6271045 at *1 (D.D.C. Aug. 2, 2005) (adopting analysis of *Glendale*). Consequently, this affidavit must be stricken.

Respectfully submitted,

HOBET MINING COMPANY, LLC
By Counsel

/s/Blair M. Gardner

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CERTIFICATE OF SERVICE

I, Blair M. Gardner, do hereby certify that on July 26, 2010, I electronically filed the foregoing HOBET MINING, LLC'S MOTION TO STRIKE THE AFFIDAVITS OF DENNIS LEMLY with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Derek O. Teaney
Joseph M. Lovett
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James M. Hecker
Public Justice
1825 K. Street, NW, Suite 200
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/s/ Blair M. Gardner